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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 644

GEORGE CASEY,
Petitioner,
vs.
UNITED STATES OF AMERICA,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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INDEX

	Page
Opinion Below	2
Jurisdiction	2
Statute Involved	2
Questions Involved	2-3
Statement of Facts	5
Additional Statement of Facts	6-7
Reasons for Granting Writ	7-11
Conclusion	11
Appendix A	
Statute Involved	13
Appendix B	
Opinion (Court of Appeals for 6th Circuit)	14-15
Judgment	15
Order Denying Rehearing	16

CITATIONS

Bollenbach v. United States, 326 U. S. 607, 90 L. Ed. 350, 66 S. Ct. 402 (1946)	9
Carroll v. United States, 267 U. S. 132, 69 L. Ed. 543, 45 S. Ct. 280, 39 A. L. R. 790	7
Henry v. United States, 361 U. S. 98, 101 4 L. Ed. 2d 132, 80 S. Ct. 168 (1959)	7
Kotteakos v. United States, 328 U. S. 750, 90 L. Ed. 1557, 66 S. Ct. 1239 (1946)	9
People v. Neal, 290 Mich. 123 (1939)	10
Schwanz v. Wajek, 163 Mich. 492 (1910)	10

STATUTES

	Page
19 U. S. C. §1595	8
21 U. S. C. §176(a)	2, 3, 14
26 U. S. C. §7237	5, 14
28 U. S. C. §1254(1)	2
Federal Rules of Criminal Procedure, 18 U. S. C. Rule 52	6, 9, 10

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit, entered in the above-entitled cause on October 31, 1961.

OPINION BELOW

The opinion of the Court of Appeals has not yet been reported; a copy of the opinion is printed in Appendix B, *infra* p. 14. There was no written opinion in the District Court for the Eastern District of Michigan, Southern Division.

JURISDICTION

The judgment of the Court of Appeals for the Sixth Circuit was entered on October 31, 1961. A rehearing was denied on December 4, 1961. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. Section 1254(1).

STATUTE INVOLVED

The statutory provision involved is Title 21, U.S.C., Section 176(a), which is set forth completely in Appendix A, *infra*, p. 13.

QUESTIONS INVOLVED

1. Was the search of the automobile which disclosed footlockers and the subsequent search of the footlockers at a bus depot illegal so as to make the admission of the evidence procured thereby a plain error which can be noticed by the Supreme Court even though not previously brought to the attention of the Court?

2. Was certain unresponsive testimony of one of the agents, indicating that he had personal knowledge which he could not put on the record, plain error which the appellate court can notice, even though objection was not made?

3. Did the trial judge's obvious partiality to the Government attorney prejudice the jury so as to deny the appellant a fair trial?

4. Were the trial judge's remarks relative to the dismissal of the case against Vicente Martinez such as would deny the appellant a fair and unprejudicial trial?

STATEMENT OF FACTS

On April 26, 1960, the Grand Jury charged George Casey, petitioner herein, and Francisco Trevino, Jesus Guerra, Pablo Lomas Sanchez, Vicente Martínez, and Eduardo Rojo with conspiracy to violate the Federal narcotic laws, to wit: Title 21 U.S.C. Section 176(a). (R. Appellant's Appendix, p. 3a-4a) Sanchez and Rojo had not been apprehended and thus were not tried with the other defendants. The facts giving rise to the indictment were essentially as follows: On March 9, 1960, William Kilman, a customs agent for the United States Treasury Department received information from another agent whose source of information remained undisclosed, that Eduardo Rojo was going to ship a quantity of marihuana into the United States from Mexico, by the use of a 1951 Cadillac and a 1950 Chevrolet automobile. (R. Appellee's Appendix, p. 1b) The agents watched these cars enter the country over the International Bridge at Del Rio, Texas, and followed the occupants of these cars by bus and plane to Detroit, Michigan. At no time was petitioner's presence in this operation established

until one of the agents testified that he noticed George Casey, of whom he had no prior knowledge, in an airport in Chicago, and his attention was drawn to him because he had "a description of a man like him who was supposed to purchase a large quantity of marihuana a few days previous to this violation and I suspected he might be this man." (R. Appellant's Appendix pp. 6a-7a). Leonard S. Warwick, a customs agent, testified that he met Agent Kilman at the Metropolitan Airport in Wayne County, Michigan, and asserted that he saw defendant George Casey as he and agent Kilman left the airport. When asked if he had any particular reason to follow Mr. Casey on March 12, 1960, he replied "No, Sir, we knew where the marihuana was going to be". (R. Appellant's Appendix, p. 15a)

By searching the car in Texas, the agents determined the presence of four footlockers, and the fact that at least one of these footlockers contained marihuana. (R. Appellee's Appendix p. 2b). (More complete facts regarding said search are specifically set forth in the "Additional Statement of Facts" appended hereto.)

The agents followed the footlockers to the Greyhound Bus Station baggage department in Detroit, Michigan, where they were picked up by one Margaret McKee. (R. Appellee's Appendix p. 3b-4b). Mrs. McKee asserted that the claim checks and the money to pay for storage was given to her by Francisco Trevino, and that she was driven to the station by one Irving McDuffie. (R. Appellee's Appendix, p. 6b). Irving McDuffie testified that in driving Mrs. McKee to the bus station, he was acting under instructions to move some luggage for George Casey, and Mrs. McKee was to instruct him where to go. When Trevino was arrested, he had a card in his possession with Casey's address scrawled on the back thereof, and Casey was arrested at that address. (R. Appellee's Appendix, p. 8b).

Sanchez and Rojo were not apprehended, and Casey, Guerra, Trevino, and Martinez were tried together for conspiracy. During the course of the trial, Martinez was dismissed on a motion made by his counsel The court went into a lengthy explanation of why Martinez was dismissed, both at the time of his dismissal and in the court's charge. The explanation did not go to the legal issues involved so much as it did to the judge's conception of the foreign policy of giving non-Americans more consideration when tried under American laws than American citizens. (R. Appellant's Appendix pp. 12a-14a). Throughout the course of the trial the trial judge made repeated references to the Government attorney by his first name "Don." (R. Appellant's Appendix, pp. 5a-15a). He also took several opportunities to express his opinion about the skill and competence of said attorney. (R. Appellant's Appendix pp. 9a-10a). As contrasted with his casual demeanor with the Government attorney, and his praise for said attorney's ability, the trial judge addressed defense counsel with the customary formality, and only on one occasion did he use any sort of familiarity at all with defense counsel, and that is when he preceded the surname of Mr. Silverman with the word "Brother". (R. Appellee's Appendix p. 9b).

All four of the defendants were found guilty by the jury. The Government subsequently charged the petitioner herein under the Habitual Criminal Statute (Title 26 U.S.C. Section 7237). (R. Appellant's Appendix p. 37a). The petitioner admitted his identity and was sentenced to serve ten years in the Federal Penitentiary. (R. Appellant's Appendix p. 38a).

ADDITIONAL STATEMENT OF FACTS

(This statement of facts relates to the first question which is set forth by the petitioner. The issue presented by this question has not been considered by the Court of Appeals, for it was not discovered until the preparation of this writ. Therefore, there is no testimony in the appendices which constitute the Certified Record which relates to this issue. The petitioner is requesting that this Court consider the issue under Rule 52(b) of the Federal Rules of Criminal Procedure, and further requests that the Court consider the Additional Statement of Facts in weighing the merits of this issue on the petition for a writ of certiorari, even though they do not form a part of the Certified Record of the case. Excerpts from the transcript of this trial which relate to this issue have been attached to the Certified Record, and designated as Appellant's Supplemental Appendix. A stipulation by and between the United States Attorney and the Appellant's Attorney to the fact that said excerpts are accurate reproductions of the testimony contained in the trial transcript is also attached. A copy of the full transcript is available if desired by this Court.)

While the automobiles were still in Texas, one of the agents followed it to the Hitching Post Motel in Uvalde, Texas. While the occupants of the car went to a restaurant, he sneaked up to the car, gained access thereto, and searched it, and discovered the footlockers. He did not search the footlockers at the time because he did not want to draw attention to himself. (R. Appellant's Supp. Appendix p. 3sa.) He followed the cars to a bus depot in D'Hanis, Texas, where after identifying himself to the manager of the bus depot, he inspected the footlockers to determine the owners and the destination thereof. Later he also inspected the interior of one of the footlockers and found a

green weedy substance which he thought to be marihuana (R. Appellant's Supp. Appendix, p. 5sa). At no time did he ever attempt to obtain a search warrant or make an arrest until the agents arrived in Detroit, Michigan.

REASONS FOR GRANTING WRIT

There are several issues raised by this case which warrant consideration by this Court because of the extensive effect they may have in the lower courts of the federal system.

1. The first issue raised by this case is one of constitutional magnitude. Although this Court has interpreted the Fourth Amendment to the Constitution numerous times, there are still areas of confusion which, if allowed to remain unclarified, could result in widespread deprivation of the fundamental liberty guaranteed by this Amendment. The specific question at issue herein is the extent to which the relaxation of the necessity to obtain a warrant when searching a motor vehicle extends. In *Carroll v. United States*, 267 U. S. 132, 69 L. Ed. 543, 45 S. Ct. 280, 39 A.L.R. 790 this Court said that the mobility of the motor vehicle required that the protections prescribed by the Fourth Amendment must yield to some extent to the practicalities of efficient law enforcement. In *Henry v. United States*, 361 U. S. 98, 101, 4 L. Ed. 2d 134, 140, 80 S. Ct. 168 (1959) this Court pointed out that the rule of *Carroll v. United States, supra*, did not dispense with the requirement of probable cause to justify the search of an automobile. The question left by these two decisions is at what point must the practicalities of efficient law enforcement yield to the rights of the individual, so as to require that a warrant be obtained before a search, and ultimately an arrest, can be made?

In the case at bar the agents had undisclosed information that the cars were going to cross the International Bridge between Texas and Mexico. They maintained a watch for the cars and saw them enter the country, and did not at that time conduct a search, even though they were specifically authorized by statute to do so without a warrant. (Title 19 U.S.C. Section 1595) Instead they chose to determine whether narcotics were in the car in a surreptitious manner by sneaking into the car while the occupants were in a restaurant, and then following them to a bus depot, hiding until they left, and then examining the baggage by identifying themselves to the manager of the depot. Although this method may be more effective, and easier for the law enforcement officials there must be a point at which the Fourth Amendment of the Constitution will intervene and require that the law enforcement methods become consistent with its mandate that a warrant must be obtained before a search can be made. Furthermore, when Congress specifically requires that the customs agents obtain a search warrant and makes an exception in a specific circumstance, it seems to be inconsistent with the Constitution and with Congressional intent to permit these officers to expand their powers by taking advantage of exceptions which were judicially created for other law enforcement officers.

Therefore, petitioner respectfully submits that this Court should define the extent to which the doctrine of the *Carroll* case extends in order to stop the confusion which reigns in the lower courts, and also to define the powers of the customs officials to conduct searches without warrants.

2. Distinct from the constitutional questions, petitioner urges that this Court should review this case in the exer-

cise of its supervisory powers over the administration of justice in the lower federal courts. The Supreme Court is the final arbiter of the meaning of the Federal Rules of Procedure. Rule 52 of the Federal Rules of Criminal Procedure has two parts: (a) says that harmless error shall not be noticed and (b) says that plain error affecting substantial rights shall be noticed even in the absence of objection.

This Court has taken the opportunity to define what is meant by "harmless error" in Section (a) quite extensively in *Bollenbach v. United States*, 326 U. S. 607, 615, 90 L. Ed. 350, 356, 66 S. Ct. 402 (1946) and *Kotteakos v. United States*, 328 U. S. 750, 765, 90 L. Ed. 1557, 1566, 66 S. Ct. 1239 (1946). However, "harmless error" and "plain error" do no encompass the whole field. There is an area which is not so harmless that it wouldn't prejudice the jury nor so substantial as to require notice without objection. Yet this Court has never defined what is meant by plain error.

It is the petitioner's contention that the answer of the agent to the question as to whether or not he followed the defendant was plain error which should have been corrected *sua sponte* by the court, or on review by the Court of Appeals. When a prosecution witness, who is extremely hostile to the defendant, in response to a completely innocent question injects flagrantly prejudicial testimony which implies personal knowledge which is legally suppressed by the technical rules of evidence, the defendant is placed in an impossible dilemma. He must either object and reinforce the implications of suppressed evidence flowing from this type of testimony, or he must be silent and let the damage go uncured because the risk of further damage is too great. This appears to be plain error, and yet in the absence of a definitive statement by the Supreme Court as to

the area encompassed by this rule, the Court of Appeals refused to consider it.

A definition of this rule is extremely important to the fair administration of criminal justice in the federal system. There are many occasions where an error will place the defendant in a dilemma such as that described above, and in weighing his decision, he should be able to determine with some degree of accuracy whether this error can be corrected on appeal.

The appellate courts, too, should be given some guidance by this Court in determining whether they may or must notice an error apparent on the face of the record if there was no objection. An individual's right to freedom cannot stand or fall solely on the competence of his counsel. The courts, too, must assume some responsibility for securing his protection, and it is the Supreme Court which must define this responsibility. Therefore, petitioner respectfully urges that the Supreme Court hear this case and use the opportunity to define the meaning of Rule 52(b) of the Federal Rules of Criminal Procedure.

3. In the exercise of its supervisory jurisdiction over the lower federal courts, the Supreme Court has the power to prescribe the rules of judicial conduct. Throughout the trial of this case, the trial judge's feeling of kinship and the bond of friendship between the trial judge and the United States attorney were clearly apparent. It is generally recognized that a trial judge has a great deal of influence over a jury, and any showing of favoritism or prejudice on one side of the litigation could have a marked effect on the thinking of the jury. (*Schwanz v. Wujek*, 163 Mich. 492, 495 (1910) and *People v. Neal*, 290 Mich. 123 (1939).

Furthermore, the method by which the trial judge explained the dismissal of Martinez from the case, based on

his nationality and the trial judge's notions of foreign policy did not comport with the impartiality and neutrality expected of trial judges. Therefore this Court should define what is expected of federal trial judges in the conduct of trials over which they preside.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be granted.

Respectfully submitted,

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Dated this 29 day of December,
A. D. 1961, Detroit, Michigan.

APPENDIX A

Title 21 U.S.C., Section 176(a): Smuggling of marihuana; penalties: evidence; definition of marihuana

Notwithstanding any other provision of law, whoever, knowingly with intent to defraud the United States, imports or brings into the United States marihuana contrary to law, or smuggles or clandestinely introduces into the United States marihuana which should have been invoiced, or receives, conceals, buys, sells, or in any manner facilitates to the transportation, concealment, or sale of such marihuana after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or whoever conspires to do any of the foregoing acts, shall be imprisoned not less than five or more than twenty years, and, in addition, may be fined not more than $20,000. For a second or subsequent offense (as determined under section 7237(c) of the Internal Revenue Code of 1954), the offender shall be imprisoned for not less than ten or more than forty years and, in addition, may be fined not more than $20,000.

Whenever on trial for a violation of this subsection, the defendant is shown to have had the marihuana in his possession, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains his possession to the satisfaction of the jury.

As used in this section, the term "marihuana" has the meaning given to such term by section 4761 of the Internal Revenue Code of 1954.

APPENDIX B

OPINION OF CIRCUIT COURT OF APPEALS

United State of America, Plaintiff-Appellee v. George Casey, Defendant-Appellant	Appeal from the United States District Court for The Eastern District of Michigan, Southern Division.

Decided October 31, 1961

Before: Miller, Chief Judge, Weick and O'Sullivan, Circuit Judges.

Per Curiam. Appellant, following trial by jury, was found guilty of conspiracy to unlawfully receive, conceal, buy, sell and facilitate the transportation and concealment of marijuana. *Section 176 (a), Title 21, U. S. Code.* He received sentence of ten years as being a habitual violator of the Federal Narcotic Laws. *Section 7237, Title 26, U. S. Code.*

Appellant contends that his rights were prejudiced by the District Judge repeatedly addressing Government counsel during the trial on intimate terms, most frequently by his given name of "Don," which left the impression with the jury that the Judge and prosecution counsel were close friends, as contrasted with the relationship between the Judge and defense counsel.

The transcript shows that a number of rulings made at the times complained of were unfavorable to Government counsel, that on one occasion the District Judge also addressed defense counsel in an informal and friendly manner, that defense counsel also addressed Government counsel by his first name, and that at no time, even in the Judge's chambers did defense counsel even suggest to the

Judge that the informality of the proceedings might be prejudicial to the appellant. We find no prejudicial error in this respect.

Appellant complains of the failure of the District Judge to order the jury to disregard an unresponsive answer of a Government agent to a question by Government counsel on re-direct examination, and to the remarks of the District Judge in explaining to the jury why he was dismissing the proceeding against a co-defendant of the appellant. No objection was made at the time of these actions of the District Judge, or to his istructions to the jury wherein it was again explained why the action was being dismissed against appellant's co-defendant, as provided by Rules 30 and 51, Rules of Criminal Procedure. In the case of an unresponsive answer by the witness to a question asked by counsel, it is the duty of opposing counsel, subject to the exception provided by Rule 52(b), Rules of Criminal Procedure, to move to strike the answer in order to rely upon it as prejudicial error upon appellate review. *Hutcson v. United States*, 67 F. (2) 731, 734, C. A. 7th, cert. denied, 292 U. S. 627; *Pawley v. United States*, 47 F. (2) 1024, 1026, C. A. 9th; *Feigin v. United States*, 3 F. (2) 866, 867, C. A. 9th. The alleged errors now complained of are not before us for review. *Metcalf v. United States*, 195 F. (2) 213, 216-217, C. A. 6th; *Stevens v. United States*, 256 F. (2) 619, 623, C. A. 9th; *Grant v. United States*, 255 F. (2) 341, 342, C. A. 6th, cert. denied, 358 U. S. 828.

If there was error on the part of the District Judge, we do not consider it such plain error or refect affecting substantial rights as should be noticed by us even though not objected to, as provided by Rule 52(b), Rules of Criminal Procedure. *Horton v. United States*, 256 F. (2) 138, 141, C. A. 6th; *United States v. Krulewitch*, 167 F. (2) 943, 947, Note 4, C. A. 2nd, reversed on other grounds, 336 U. S. 440. See: *Edwards v. United States*, 265 F. (2) 909, 910, C. A. 6th, cert. denied, 361 U. S. 845.

The judgment is affirmed.

ORDER DENYING PETITION FOR REHEARING

United States of America,
Plaintiff-Appellee,
v.
George Casey,
Defendant-Appellant

Before: Miller, Chief Judge, Weick and O'Sullivan, Circuit Judges.

Appellant's Petition for Rehearing having been considered by the Court;

It is ordered that said petition be denied.

Approved for entry:

Shackelford Miller J.,
Chief Judge, U. S. Court of
Appeals, Sixth Circuit.
Appeals, Sixth Circuit.